BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROGER DALE COLBERT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,050,684
RUBBERMAID, INC.	)	
a/k/a NEWELL RUBBERMAID	)	
Self-Insured Respondent	)	

ORDER

Respondent appeals the August 20, 2010, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was found to have suffered personal injury by accident which arose out of and in the course of his employment with respondent. Claimant was awarded medical mileage for the examination by Paul S. Stein, M.D., respondent was ordered to pay all outstanding medical bills which were not the result of the carpal tunnel release surgery and respondent was ordered to submit a list of three physicians from which claimant was to select the authorized treating physician for the treatment of claimant's left shoulder and neck.

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, Terry J. Torline of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Roger Dale Colbert taken June 9, 2010; the transcript of Preliminary Hearing held August 17, 2010, with attachments; and the documents filed of record in this matter.

ISSUES

1. Respondent argues that the ALJ did not have jurisdiction to hear and decide this matter. The matter was originally assigned by the Director of Workers Compensation (Director) to Administrative Law Judge John D. Clark. However, Judge Clark became ill and was unable to hear the matter. Judge Barnes stepped in and held the preliminary hearing. Respondent argues that when an administrative law judge becomes incapacitated, the proper procedure is to have the Director appoint a special administrative law judge to hear the matter. No such order is contained in this file. Therefore, respondent contends

that Judge Barnes was without jurisdiction to hear and decide this matter. Claimant contends that Judge Barnes is a duly appointed Administrative Law Judge and the assignment of the matter to ALJ Clark does not exclude the involvement of other administrative law judges in emergency situations.

2. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent contends that claimant awoke with a numb arm and failed to report a work-related accident to the emergency room personnel at the William Newton Memorial Hospital. Additionally, no medical reports or opinions in this record connect claimant's health problems with claimant's employment. Respondent also contends that, pursuant to K.S.A. 2009 Supp. 44-508(d), claimant's accident, if he had one, occurred well after claimant's employment with respondent ended. Therefore, the problems are not compensable. Claimant argues that his testimony alone is sufficient evidence of a work injury.

3. What is the date of accident in this matter? Claimant testified to a specific trauma on or about March 7, 2010, when he reached up to grab a heavy object at work and experienced a burning in his left shoulder and neck. Respondent denies this accident occurred, arguing that claimant reported to personnel at the William Newton Memorial Hospital emergency room (ER) that he awoke with numbness in his left arm. No mention of a work-related accident with respondent was noted. Claimant also filed an E-1 (K-WC E-1, Application For Hearing) on May 11, 2010, claiming overuse while performing his normal work duties, with injuries to his neck, left upper extremity and all parts affected. Claimant contends the series ended on May 4, 2010, claimant's last day worked for respondent. No date of accident determination was rendered by the ALJ. Respondent contends the appropriate date of accident is May 12, 2010, pursuant to K.S.A. 2009 Supp. 44-508(d).

4. Did claimant provide timely notice of his alleged accidents? Respondent contends that claimant failed to notify respondent of a work-related series of accidents until well after claimant was terminated. Respondent also argues that medical records contemporaneous with claimant's alleged accidents fail to mention a work-related connection to claimant's symptoms. Claimant alleges that he immediately notified his supervisor of his left arm numbness and left work to obtain emergency medical treatment.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed with regard to whether claimant suffered personal injury by accident which arose out of and in the course of his employment with respondent.

Claimant began working for respondent on May 6, 2006. His job involved removing tails or remnants from the extrusion process as respondent created hot rubber or plastic parts. The tails could weigh up to 50 or 60 pounds. Claimant contends that on March 7, 2010, claimant's left arm went numb when he raised his arm to pick up something. Claimant felt a numbness and burning to his left shoulder. He also felt a sharp pain in his neck. Claimant advised his supervisor, Denise, of the problem and the fact he was going to the ER. However, the ER records from William Newton Memorial Hospital do not contain a description of a work-related accident. When board certified neurological surgeon Paul S. Stein, M.D., reviewed the ER records, he found only a comment that claimant had reported to the ER that he had awakened with numbness in his left arm and it had happened in the past. The ER record also discussed a history of an injury in 1989 to the left shoulder and hip which resulted in claimant being off work for two years.

Claimant was examined by his primary care physician, Dr. K. Shahzada, on March 12, 2010. A March 17, 2010, MRI scan of the cervical spine indicated a left C6-7 lesion with possible focal osteophyte or disk protrusion. Nerve conduction studies on April 1, 2010, indicated carpal tunnel syndrome. According to Dr. Shahzada's May 21, 2010, note, as interpreted by Dr. Stein in his July 16, 2010, report, claimant stated to Dr. Shahzada that his symptoms started while he was at work. Claimant was referred to Christopher W. Siwek, M.D., who performed a left carpal tunnel release surgery. As of June 1, 2010, claimant was noted to be four days post surgery and doing extremely well.

This matter was scheduled for preliminary hearing in front of Judge Clark. In place of that proposed hearing, an agreed order[1] was issued and claimant was referred to Dr. Stein for an independent medical examination (IME) to determine whether Dr. Stein felt all or part of claimant's problems were work related and what treatment recommendations were appropriate. The Order noted that all of respondent's defenses were preserved.

Dr. Stein examined claimant on July 16, 2010. After reviewing claimant's injury and treatment history, Dr. Stein opined that claimant had failed to prove a connection between his neck and left shoulder complaints and the March 2010 injury at work. Dr. Stein also determined that the medical treatment records failed to indicate that the carpal tunnel syndrome was work related. Dr. Stein did not render an opinion regarding whether claimant had suffered a series of accidents while working for respondent. Dr. Stein noted that Dr. Shahzada had also opined that claimant's carpal tunnel syndrome was not work related.

The matter returned for a preliminary hearing after receipt of Dr. Stein's report. However, Judge Clark was ill and the preliminary hearing was held by Judge Barnes in his stead. At the preliminary hearing, respondent did not object to the matter being heard

[1] Order of Judge Clark (June 15, 2010).

by Judge Barnes. There is no order in the file appointing Judge Barnes to act in Judge Clark's place.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534a(a)(1)(2) states:

> (a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.
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> (2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid

> from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 44-551(k) states:

> (k) In case of emergency the director may appoint special local administrative law judges and assign to them the examination and hearing of any designated case or cases. Such special local administrative law judges shall be attorneys and admitted to practice law in the state of Kansas and shall, as to all cases assigned to them, exercise the same powers as provided by this section for the regular administrative law judges. Special local administrative law judges shall receive a fee commensurate with the services rendered as fixed by rules and regulations adopted by the director. The fees prescribed by this section prior to the effective date of this act shall be effective until different fees are fixed by such rules and regulations.

Respondent argues that Judge Barnes was without jurisdiction to consider the matter in the absence of Judge Clark. K.S.A. 44-534a does detail the procedure for appointing an administrative law judge in a workers compensation matter. However, once an administrative law judge is appointed to hear a matter, the statute does not make that case the exclusive property of that administrative law judge. Preliminary hearings, summary in nature, are held by "an administrative law judge". It does not limit the hearing to only the specific administrative law judge appointed by the Director. Additionally, administrative law judges are equally empowered under K.S.A. 2009 Supp. 44-551(i)(1). Finally, the language of the statute allows the appointment of special administrative law judges when an emergency arises. This does not require the appointment of a regular administrative law judge, nor does it prohibit an administrative law judge in the same office as the one encountering the emergency from assisting in the time of need. Judicial economy would call for cooperation among administrative law judges in the same office the same as fellow workers in any office. The Board finds that Judge Barnes was equally empowered to hear the matter as was Judge Clark. Her willingness to hear the matter during Judge Clark's illness is to be commended, not criticized.

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which

> the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[2]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[3]

Certain issues before the Board in this matter hinge upon the determination of the appropriate date of accident. Claimant has alleged a specific traumatic injury date of March 7, 2010, and a series of traumas through his last day worked on May 4, 2010. The March 7 date is specific. However, whenever a claimant alleges a series of traumas over a long period of time, the date of accident is controlled by K.S.A. 2009 Supp. 44-508(d).

Initially, in this matter, when claimant reported his alleged accidents, he was denied medical treatment and was forced to seek treatment with his personal physician. Thus, the first two criteria contained in K.S.A. 2009 Supp. 44-508(d) have not been met. Claimant was neither taken off work nor restricted by an authorized physician. The first written notice provided by claimant occurred when the E-1 was filed on May 11, 2010, approximately 7 days after claimant's last day worked. Under K.S.A. 2009 Supp. 44-508(d), claimant's date of accident would be May 11, 2010. In the recent past, the date of accident was dealt with as follows:

When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day before the claimant's job is substantially changed.[4]

However, the Kansas legislature adopted K.S.A. 44-508(d) in an attempt to clarify the confusion over the date of accident when dealing with a series of traumas. The end result was anything but clear. In certain situations, the date of accident has been

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[2] K.S.A. 2009 Supp. 44-508(d).

[3] K.S.A. 44-520.

[4] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

held to be on a date after the claimant had left work. In *Saylor*,[5] the Kansas Court of Appeals allowed a date of accident several weeks after an injured claimant left work to recover from non-work-related knee surgery. Based upon K.S.A. 44-508(d), the claimant's date of accident was held to be March 28, 2006, when the respondent received the claimant's notice of intent. This was well after the claimant's last day worked on February 6, 2006, and the date of the claimant's knee replacement surgery on February 7, 2006. The Court in *Saylor* addressed the old provision of law which established a bright-line rule which set the date of accident in a series-of-accidents situation as being the last day worked. *Saylor* cited the Kansas Supreme Court case of *Kimbrough* when discussing the bright-line rule.[6] The Court in *Saylor* went on to discuss the legislative intent involving the revision of an existing law, holding that the Court presumes that the legislature intended to change the law as it existed prior to the amendment.[7] The *Saylor* Court rejected the respondent's argument that a date of accident several weeks after a claimant leaves his or her employment is illogical and absurd. The *Saylor* Court held that the elements of an accident are not to be interpreted in a strict and literal sense.[8]

The Board raises this discussion because the Kansas Supreme Court, in its recent decision in *Mitchell*,[9] appears to have resurrected the old "last day worked" bright-line rule in microtrauma situations. While discussing the rules in K.S.A. 2009 Supp. 44-508(d), the Court held that the Workers Compensation Board's decision to set the date of accident as the last day worked was appropriate and in agreement with both statutory and case law. The Court then cited *Kimbrough* as the basis for its decision. The Board is uncertain whether the Court is attempting to limit the potential results under K.S.A. 44-508(d) by allowing the date of accident to be statutorily determined, but with a final date no later than the last day worked. While this result would answer certain criticism against the statute, it appears to violate the specific language of the statute.

In this instance, whether the Board uses the provisions in K.S.A. 2009 Supp. 44-508(d) or the bright-line rule from *Kimbrough*, the end result is the same. Claimant either suffered a series of accidents through May 4, 2010, the last day worked, or the date of accident is May 11, 2010, when the E-1 was filed and served on respondent. Either

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[5] *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 207 P.3d 275 (2009), *rev. granted* May 18, 2010.

[6] *Id*. at 1047-1048, citing *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

[7] *Id*. at 1048, citing *State v. McElroy*, 281 Kan. 256, 103 P.3d 100 (2000).

[8] *Id*. at 1048.

[9] *Mitchell v. Petsmart, Inc.*, ___ Kan. ___, 239 P.3d 51 (2010).

date results in timely notice of accident to respondent. However, the possible confusion created in *Mitchell* remains.

Respondent contends that claimant was not an employee on the date of accident. Respondent does not deny that claimant was working for it up to the last day on May 4, 2010, just that the date of accident occurred after claimant left respondent's employ. The above analysis defeats this argument. The date of accident is a legal fiction when dealing with a series of microtraumas. While the end result of a date of accident being after claimant last worked for respondent seems strange, the legislative intent in trying to give guidance for determining the date when dealing with a long series of traumas is understandable. Both the Kansas legislature and the Kansas courts have struggled with this dilemma for decades.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[10]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[11]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[12]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[13]

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[10] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[11] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[12] K.S.A. 2009 Supp. 44-501(a).

[13] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

The only medical report contained in this record is that of Dr. Stein dated July 16, 2010. In that report, Dr. Stein opined that claimant failed to show, within a reasonable degree of medical probability or certainty, that he sustained injury to his neck or left shoulder in March of 2010 at work. Additionally, Dr. Stein stated that neither he nor Dr. Shahzada were able to connect claimant's carpal tunnel syndrome with claimant's work activity at respondent. The ER notes identified reported left arm numbness upon awakening. This numbness improved when claimant rolled off of the arm. Again, there was no indication of a work-related connection. The purpose of the referral to Dr. Stein was to assist the Administrative Law Judge in determining what, if any, connection there was between claimant's employment with respondent and his injuries to his left upper extremity and neck. Dr. Stein's determination that there was no connection is uncontradicted medically in this record. This Board Member finds that claimant has failed to prove a connection between his ongoing symptoms in his left upper extremity and neck and his employment with respondent. The Order of Judge Barnes awarding benefits on a preliminary basis is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that his ongoing symptoms in his left upper extremity and neck stem from his employment with respondent. The award of benefits on a preliminary basis by Judge Barnes is reversed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated August 20, 2010, should be, and is hereby, reversed with regard to whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent.

IT IS SO ORDERED.

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[14] K.S.A. 44-534a.

Dated this ____ day of October, 2010.

HONORABLE GARY M. KORTE

c: Joseph Seiwert, Attorney for Claimant
Terry J. Torline, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
John D. Clark, Administrative Law Judge